SERVED: March 23, 1993

NTSB Order No. EA-3821

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

JOSEPH DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. JESUS JOHN HERNANDEZ, Respondent.	)	Docket SE-8692RM

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on January 24, 1991, following an evidentiary hearing that responded to our order, NTSB Order EA-3164 (July 27, 1990), remanding this case to the law judge.[1] The law judge had granted summary judgment for the Administrator on his order

[1]The initial decision, an excerpt from the hearing transcript, is attached.

revoking respondent's commercial pilot certificate for violating 14 C.F.R. 61.15(a) on three separate occasions. (In 1982 and 1986, respondent was convicted of unlawful distribution, manufacturing, dispensing, sale or possession of cocaine. In 1986, he was also convicted of conspiracy to import marijuana.) We remanded to provide respondent the opportunity to offer mitigating evidence on the issue of sanction.

On remand, the law judge reduced the sanction from revocation to a 1-year suspension. He found that respondent did not use his airman certificate in perpetrating the crimes of which he was convicted, but instead acted as a broker, and could have done so without a certificate.[2] The law judge concluded that revocation was too severe a sanction. We grant the appeal and reinstate the order of revocation.

The Administrator argues that the law judge's conclusion -- to require revocation only when a respondent uses an airman certificate in the § 61.15(a) activity -- fails to reflect recent policy and precedent supporting certificate revocation in the case at bar.[3] Moreover, the Administrator argues, citing

[2]In explaining his modification of the sanction, the law judge stated: "this doesn't really do much more for the respondent, other than the fact that he won't have to retake a written exam because by the time the respondent gets released [from prison], he's going to be so out of date that if he intends to ever utilize this certificate again, it's going to require an awful lot of effort to get recurrent [sic]." Tr. at 59. This analysis does not offer the clear and compelling reasons necessary to modify the Administrator's order. Administrator v. Muzquiz, 2 NTSB 1474 (1975).

[3]In 1989, the Administrator adopted a policy ordering

Administrator v. Pekarcik, 3 NTSB 2903 (1980), and Administrator v. Kolek, 5 NTSB 1437 (1986), aff'd Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989), that revocation is warranted even under his prior policy.

Respondent counters that his actions do not approach those in Pekarcik, and in his case there are other factors mitigating against revocation and in favor of the law judge's 1-year suspension.[4] He also argues that applying a recently adopted policy to actions he took before that policy was effective violates ex post facto protection.

Respondent's conduct is proscribed by § 61.15(a) and the Administrator's policy directs revocation. Respondent's contention that ex post facto principles preclude application of current policy and precedent must fail, as these principles apply to criminal law, not this civil proceeding.

But, even if we assume that the new policy does not apply, and we, therefore, apply prior policy and precedent, we also

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revocation in the case of two or more drug convictions, except in extraordinary circumstances. See discussion in Appeal, at footnote 2. Board case law has followed that trend. See, e.g., Administrator v. Beahm, NTSB Order EA-3769 (1993), slip op. at 4 (revocation could be based on convictions for knowing and intentional possession of cocaine and distribution of cocaine; such actions demonstrate lack of qualification). Prior to this change, the severity of the sanction (revocation or suspensions of various periods) depended, as discussed infra, on whether aircraft or airmen's certificates were used in furtherance of the illicit activity.

[4]E.g., he was not directly involved with the operation of the aircraft, no smuggling actually took place as the aircraft he provided were not satisfactory, he cooperated as a government witness, and his prison record is good.

agree with the Administrator that the law judge's interpretation reads pre-1989 policy and our precedent too narrowly.[5] Respondent's actions and convictions would warrant revocation, whether under the new or the old standards.

Although in some earlier cases we appeared to rely on the exercise of an airman certificate in the commission of a drug offense, we also looked at the broader question of whether an aircraft was involved in the crime. As the court in Kolek noted, 869 F.2d 1285, "although lack of aircraft use in a narcotics violation has frequently carried significant weight in NTSB decisions . . . use or nonuse of an aircraft has not uniformly trumped other factors in the analysis." (Citation omitted.) The court cited as an example Administrator v. Smith, 3 NTSB 283 (1977), which involved no aircraft use.

In those cases where aircraft were involved in the crime, we typically looked at the extent of a respondent's involvement, but a respondent need not have been exercising an airman certificate (for example, piloting the aircraft) to make the event(s) sufficiently serious as to warrant revocation. Indeed,

[5]While we do not decide the issue, with regard to ex post facto principles, we note the argument that can be made for the proposition that respondent knew or should have known that his activities would lead to revocation of his airman certificate. As we have noted, the regulation at the time authorized suspension or revocation. The Administrator's order to respondent directed revocation. Respondent's assistance and support of the drug-running activity could easily be seen as an absence of the care, fitness and responsibility required of a commercial pilot certificate holder and thereby demonstrate lack of qualification, the basic standard for revocation.

§ 61.15(a) notices the possibility of suspension or revocation for narcotics convictions, and contains no reference to use of airman certificates or aircraft involvement.[6] Thus, in Administrator v. Freeze, 3 NTSB 1794 (1979), we declined to uphold revocation where respondent's involvement with the aircraft used in the illegal activity was peripheral: he performed a check ride. In Kolek, in contrast, there was no direct aircraft connection.[7] Revocation was based on respondent's drug trafficking organization.

Here, although respondent did not exercise his certificate in the commission of the crimes of which he was convicted, aircraft involvement was deeper than can be termed peripheral. He located the aircraft and made arrangements for its use, such as purchasing fuel, and finding a ferry company to deliver it to Aruba. Therefore, revocation is supported even under the prior policy and line of cases requiring that aircraft be involved in the crime. Respondent's activities showed a lack of the care, judgment and responsibility required of the holder of a commercial pilot certificate and justify revocation.[8]

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[6]§ 61.15(a) reads in part: A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for . . . suspension or revocation of any certificate or rating issued under this part.

[7]5 NTSB 1438-1439.

[8]In reply, respondent also contends that the law judge's decision should be upheld because: 1) it was based on several mitigating factors in addition to the fact that his certificate

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The initial decision is modified as provided in this opinion; and

3. The Administrator's order of revocation is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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was not in use during the crime; and 2) the law judge's credibility determinations require deference. There are no specific credibility findings by the law judge (although some may be implied, see Tr. at 57-58) that affect our analysis. It, rather, is dependent on facts established in the record. Similarly, the mitigating factors respondent cites do not in our view warrant a reduced sanction.